No. 262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GOODALL-SANFORD, INC., *Petitioner*

v.

UNITED TEXTILE WORKERS OF AMERICA, A.F.L.
LOCAL 1802, ET AL.

MEMORANDUM FOR RESPONDENTS

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MEMORANDUM FOR RESPONDENTS

I

Questions 1-4 and 7 of the petition herein set forth issues substantially the same as those presented by the pending petitions for certiorari in *Textile Workers Union of America* v. *Lincoln Mills,* No. 211, and *General Electric Co.* v. *Local 205, UE,* No. 276. These are important issues of federal law as to which there are clear conflicts among the circuits. Respondents do not, therefore, oppose the granting of certiorari with respect to these questions.

II

Questions 5 and 6 (set forth in the petition for certiorari herein on pages 2-3) were not mentioned by the Court of Appeals and do not present any issue substantial enough to warrant review in this Court. They should be excluded from any grant of certiorari.

The situation with respect to questions 5 and 6 is as follows:

The complaint here set forth the facts, the dispute between the parties, the collective bargaining agreement, and the Union's contention that the Company was required by the agreement to arbitrate the dispute. In its answer, the Company (petitioner herein) set forth, among other things, its conclusion that the collective bargaining agreement did not cover or purport to cover the factual situation presented (R. 28). Hence, it argued, the issues the Union sought to arbitrate were not arbitrable. The Union moved for summary judgment. The District Court concluded, on the basis of the undisputed facts and the terms of the collective agreement, that the issues were arbitrable and granted the motion for summary judgment. The Court of Appeals affirmed.

Petitioner does not seek to bring before this Court the merits of the dispute as to arbitrability. In questions 5 and 6, however, petitioner asserts that the District Court and the Court of Appeals were precluded from reaching their decision on this question by Rule 56 of the Rules of Civil Procedure. It is argued that Rule 56 required that, on the Union's motion for summary judgment, the District Court accept as true all of the allegations in the Company's answer, including the statement that the collective agreement did not cover the issues sought to be arbitrated.

This argument plainly confuses a motion for summary judgment under Rule 56 with a motion for judgment on the pleadings under Rule 12. Equally plainly, it overlooks the distinction between an allegation of fact and a conclusion of law.

Rule 56 permits summary judgment if there is "no genuine issue as to any material fact . . ." There was no issue of fact here. No trial could be had on the basis of the Company's allegation. That allegation was purely and simply a legal conclusion as to the meaning and effect of the contract. It amounted in substance to nothing more than a

general conclusion that the Union was not, on the admitted facts, and the admitted contract, entitled to the relief sought. The very purpose of Rule 56 is to permit summary judgment in such a situation and to avoid a trial in which there are no issues of fact to be tried.

III

This case does present one additional issue not set forth in the petition for certiorari. That issue is:

> Whether an order of a District Court under § 4 of the Arbitration Act, directing the parties to perform an agreement to arbitrate, is a "final" decision from which an appeal may be taken under 28 U.S.C. 1291.

This issue is discussed by the Court of Appeals on pages 3-4 of its opinion in this case, and the authorities on both sides clearly noted.

Baltimore Contractors v. *Bodinger*, 348 U.S. 176, establishes that where arbitration results, under § 3 of the Arbitration Act, from an order staying a pending action, no appeal lies if the main action is equitable in nature. The Second Circuit has applied the same reasoning when the stay is coupled with an affirmative order directing arbitration. *Wilson Bros.* v. *Textile Workers Union*, 224 F. 2d 176 (1955), *cert. denied* 350 U.S. 834, and has indicated that the same rule would be applied, for reasons of uniformity and policy, to an independent application to compel arbitration under § 4 of the Act. *Stathatos* v. *Arnold Bernstein S.S. Corp.*, 202 F. 2d 525 (1953). Conceding that "there is much force to this view", the First Circuit in this case nevertheless stated that it was more persuaded by older precedents which viewed an order to arbitrate under § 4 of the Arbitration Act as being final in the sense of 28 U.S.C. 1291.

The Second Circuit's reasoning in the cases cited may rest, in part at least, on its earlier holding that "Arbitration is merely a form of trial, to be adopted in the action

itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under the Federal Rules of Civil Procedure . . ." *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383. This Court, in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 202, expressly disagreed with that premise. It may be, therefore, that the Second Circuit would not now adhere to its view as to nonfinality, contrary to the First Circuit. But cf. *Turkish State Rwys.* v. *Vulcan Iron Works*, 230 F. 2d 108, 110 (3d Cir. 1956). We believe, however, that there is sufficient doubt about the issue—particularly in view of the First Circuit's expressed uncertainty—that it should be included in the questions presented for decision if certiorari is granted herein.

IV

CONCLUSION

For the reasons above set forth, it is respectfully submitted that any grant of certiorari herein should be limited to the following questions decided by the Court of Appeals: Questions 1-4 and 7 set forth in the petition for certiorari and the additional question noted in this Memorandum.

Respectfully submitted,

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